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No. 99-1637

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In the Supreme Court of the United States

OCTOBER TERM, 1999

RAFFENSPERGER, HUGHES & CO., INC.,
BARNES & THORNBURG, AND CATHERINE L. BRIDGE,

Petitioners,

v.

VIRGINIA E. BROUWER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their Brief in Opposition, respondents make three key concessions that underscore the reasons for granting the Petition. First, they concede that in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1992), this Court ruled that outside service providers can be liable under Section 1962(c) of RICO *only if* they "participate in the management or control of the enterprise." Opp. i. Second, they concede that petitioners here did not manage or control the RICO enterprise and thus were properly exonerated from direct liability under Section 1962(c). And, third, they concede that the Circuits are currently in conflict on the question whether the "operation or management" test that *Reves* established as a prerequisite to liability under Section 1962(c) also applies to claims under Section 1962(d) of conspiracy to violate that provision.

Respondents speculate, however, that this acknowledged Circuit conflict will eventually disappear in light of *Salinas* v. *United States*, 522 U.S. 52 (1997). Dismissing *Reves* as "irrelevant," they contend that *Salinas* "[o]bviously * * * controls" and requires a holding that the "operation or management" test does not apply to conspiracy claims. But by setting aside *Reves* because it was "earlier [than *Salinas*] and did not address conspiracy liability" (Opp. 11), respondents sidestep the central question underlying the Petition. This Court ruled in *Reves* that Congress made a legislative judgment to exclude from liability under Section 1962(c) those persons who merely *facilitate* the corrupt operation or management of an enterprise. How can it comport with this legislative intent to impose conspiracy liability on those who merely *agree to facilitate* the operation or management of the enterprise? Respondents do not deny that the rule for which they argue would render *Reves* an aimless relic and frustrate the legislative judgment on which it rests.

In arguing that *Salinas* somehow forecloses the application of the *Reves* "operation or management" test in conspiracy cases, respondents never address the fact that the Court in *Salinas* emphasized that Salinas was "managing" the enterprise.

522 U.S. at 55. And they utterly ignore this Court's decision just a few weeks ago in *Beck* v. *Prupis*, 529 U.S. ___ (2000), which holds that, in a RICO *civil* damage case like this one, the "general conspiracy principles" that inform the scope of liability are those found in civil law, not the criminal conspiracy doctrines applicable in *Salinas*.

Finally, respondents do not even try to deny that the question presented by the Petition is important and recurring.

I. RESPONDENTS CONCEDE THAT PETITIONERS DID NOT "CONDUCT OR MANAGE" THE ENTERPRISE, SO THE ISSUE IS SQUARELY FRAMED.

Although respondents offer a slanted portrayal of petitioners' role in the events, the case comes before this Court without any dispute about the dispositive facts. The court of appeals (Pet. App. 2a) accepted the district court's findings, in granting summary judgment, that B&T had neither participated nor agreed to participate in the operation or management of the enterprise (*id.* at 58a), and that respondents failed to plead facts showing such participation or agreement by Raffensperger (*id.* at 18a, 23a). Respondents now concede that "***neither Raffensperger nor B&T directly operated or managed the enterprise***." Opp. 6 (emphasis added). Instead, they assert only that petitioners engaged in the kind of conduct that *Reves* held insufficient to create direct liability under Section 1962(c) — that petitioners "assisted" or "facilitated" the allegedly wrongful conduct of the enterprise's affairs. See, *e.g.*, Opp. 3 ("Petitioners' actions directly *facilitated* the fraudulent sale of the notes."); *id.* at 5 ("B&T * * * *assisted* Raffensperger in setting the deceptive minimum yields.") (all emphasis added).

There is, therefore, no dispute that our Petition perfectly frames the legal issue posed by *Reves* and *Salinas*: whether a defendant exonerated under Section 1962(c), because he is alleged only to have *facilitated* (but not to have participated in) the operation or management of an enterprise through a pattern

of racketeering, nevertheless may be held liable under Section 1962(d) for allegedly *agreeing to facilitate* (but not to participate in) the operation or management of the enterprise.

II. THE CIRCUIT CONFLICT PERSISTS.

As we explained in our Petition, the six Circuits that have considered the question presented by this petition have disagreed about its answer. The Third and the Ninth Circuits have concluded that *Reves* precludes liability for conspiring to violate Section 1962(c), unless the defendant agreed to participate personally in operating or managing the RICO enterprise. The Second, Fifth, and Eleventh Circuits, like the Seventh Circuit in the decision below, have held the opposite.

Respondents agree that, before *Salinas*, it "certainly * * * would have been fair to argue that a split in the Circuits existed on the question." Opp. 7. They argue, however, that this conflict is now illusory, because the Third and Ninth Circuits can be expected to change their position in response to *Salinas*. That speculation is unfounded.

First, *Salinas* did not change the governing law in the Third and Ninth Circuits. Even before *Salinas*, both Circuits had already adopted the rule this Court upheld in *Salinas* — that a defendant need not agree personally to commit two predicate acts in order to be liable under § 1962(d) for conspiracy to violate § 1962(c). See, *e.g.*, *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir. 1985) ("to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts"); *United States* v. *Morelli*, 169 F.3d 798, 802 n.3 (3d Cir. 1999) (noting that *Adams* rule was upheld in *Salinas*). The Ninth Circuit, too, had anticipated the result reached in *Salinas*. See, *e.g.*, *Neibel* v. *Trans World Assurance Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997). Indeed, the Ninth Circuit derived that rule by applying the same general principles of conspiracy law that this Court later relied upon in *Salinas*. See *United States* v. *Brooklier*, 685 F.2d 1208, 1220 & n.6 (9th Cir. 1982).

Thus, these Circuits have already found the rule adopted in *Salinas* to be perfectly consistent with a requirement that each conspirator must have agreed to participate personally in operating or managing the enterprise. There is, therefore, no reason to believe that *Salinas* will cause them to change their views about the continuing validity of their position on the issue raised in this Petition.

Second, despite respondents' argument, the court below candidly recognized that *Salinas* did not expressly or implicitly answer the question raised by the Petition. See Pet. App. 7a ("*Salinas*, focused as it was on the issue of predicate acts, is not directly helpful in answering the question."). And as we have noted, *Salinas* involved a defendant whom this Court expressly characterized as a manager of the corrupt enterprise. *Salinas*, moreover, applied principles of *criminal* conspiracy law. But as we discuss further below, this Court's recent decision in *Beck* v. *Prupis* holds that the scope of *civil* and *criminal* conspiracy under RICO are quite different, and that the contours of *civil* liability for RICO conspiracy must be determined with reference to principles of *civil* conspiracy developed at common law.

Thus, in the 1999 editions of the two leading treatises on RICO, commentators writing since *Salinas* recognize that a clear conflict among the Circuits persists on the issue posed here. See Pet. 8 & n.2. Ignoring this authority, respondents' argument that *Salinas* obliterated this explicit conflict is just wishful thinking.

III. AS SHOWN BY THE COURT'S RECENT DECISION IN *BECK* V. *PRUPIS*, *SALINAS* DID NOT RESOLVE THE ISSUE LEFT OPEN BY *REVES*.

In our Petition, we explained how the ruling below, which purported to "reconcile *Salinas* and *Reves*" (Pet. App. 12a), would "excessively extend *Salinas* and essentially nullify *Reves*." Pet. 13. Respondents dismissively retort that "*Reves* is irrelevant" (Opp. 10) and "*Salinas* must control" (*id.* at 12).

Neither of these simplistic responses resolves the genuine tension between *Reves* and *Salinas*.

1. Respondents contend that the principles of *Reves* do not apply here because *Reves* "simply had nothing to do with conspiracy principles." Opp. 10. Of course, it would be just as apt to observe that *Salinas* had "nothing to do" with the liability of a person who was not an operator of the enterprise. But these observations beg the question, which is whether the "operation or management" test *should* apply to conspiracy claims. Respondents do not refute our arguments that applying this test to conspiracy claims is necessary to give effect to the intent of Congress.

First, respondents never acknowledge the "insider/outsider" distinction that this Court recognized in *Reves* as fundamental to the legislative plan. In *Reves*, the Court examined the text and legislative history of RICO and concluded that Congress had decided to limit civil RICO liability only to "insiders" who personally conduct the affairs of the corrupt enterprise or participate personally in managing its affairs. By contrast, the Court concluded that Congress decided not to make "outsiders" liable for merely aiding, facilitating or encouraging those violations. See, *e.g.*, 507 U.S. at 185 ("§ 1962(c) cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs."). Respondents concede (Opp. 16) that nothing in the legislative history reflects an intention to broaden through the conspiracy provision the class of persons who can be liable for a section 1962(c) violation.

Because they cannot demonstrate any congressional intent to sweep away the insider/outsider distinction in a conspiracy case, respondents simply deny that the distinction exists. They assert that "an outside service provider can be liable under Section 1962(c) *if he or she manages or operates the enterprise*." Opp. 16 (emphasis added). But respondents'

grudging concession is fundamental, because, as *Reves* held, anyone who operates or manages the enterprise *becomes* an insider. *See* 507 U.S. at 179 ("RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required."). The point is that, when it enacted Section 1962(c), Congress intended to capture such inside operators, but not mere outside facilitators.

Even the court of appeals recognized that, "[i]ntuitively, it seems wrong that a person could conspire to violate a law which does not apply to him." Pet. App. 10a; see also *United States* v. *Antar*, 53 F.3d 568, 581 (3d Cir. 1995) (conspiracy liability "should not attach" when "the defendant is not conspiring to do something for which he or she could be held liable under the substantive clause of the statute"). Such a rule not only is "[i]ntuitively * * * wrong," but also amounts to an absurd construction of the statute. Respondents do not explain how it would comport with congressional intent to hold mere outside facilitators liable for conspiracy, when Congress has determined that such persons do not bear any substantive liability for the completed offense.

Second, respondents do not dispute that the approach for which they argue would "risk eviscerating *Reves*." *Antar*, 53 F.3d at 581. Indeed, their analysis confirms this conclusion. According to respondents (and the court below), "all that is required is a knowing agreement to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner." Opp. 1. *Reves*, however, *exculpates* from civil RICO liability those who merely "facilitate" the activities of persons who are operating an enterprise illegally. By contrast, respondents' proposed rule *inculpates* those who merely *agree* to do so. Their approach is simply a cleverly contrived way of trying to overrule *Reves*. Virtually any RICO enterprise will have several persons in and around its affairs. If labeling each one a "conspirator" were sufficient to impose liability on them, this theory would create liability for very same persons whom Congress intended,

according to *Reves*, to place outside the realm of direct RICO liability under Section 1962(c).

The Court's opinion in *Salinas* does not even mention *Reves*. It is unrealistic to infer from this silence that the Court intended, *sub silentio*, to nullify the "operation or management" test it had recently established in *Reves*. Respondents do not begin to justify their contrary inference that *Salinas* implicitly overruled *Reves* for multi-defendant "conspiracy" cases indistinguishable from *Reves*.

2. Nevertheless, respondents, like the court below, rest their case entirely on *Salinas*, contending that *Salinas* "[o]bviously * * * must control" (Opp. 12). In relying exclusively on *Salinas*, respondents and the court below simply fail to come to grips with the vital distinctions that show why *Salinas* does not answer the question posed here.

First, neither respondents nor the Seventh Circuit acknowledged that the Court's opinion actually emphasized that Salinas *was* one of the "managers" of the corrupted enterprise (the county jail). Therefore, he was subject to criminal liability for conspiracy to violate Section 1962(c) under the "operation or management" test we are supporting.

Second, neither respondents nor the court below recognized the importance of the fact that *Salinas* was a criminal case, while this case concerns the scope of *civil* liability under RICO. As this Court's recent ruling in *Beck* v. *Prupis*, *supra*, makes clear, principles of criminal conspiracy law cannot simply be transposed to define the boundaries of liability in a civil RICO conspiracy case. Indeed, the Court explicitly rejected the attempt to make *Salinas* control the outcome there. The Court explained that the "conjunction" between the conspiracy language in Section 1962(d) and the civil treble-damage authorization in Section 1964(c) requires resort to the "law of civil conspiracy" to define the scope of liability. Slip op. at 7, n.6. Respondents never even mention this recent decision.

Thus, they invoke *Salinas* for the proposition that "no overt act is required" to establish a RICO conspiracy. Opp. 12. That statement is correct for RICO *criminal* prosecutions. But in *Beck*, this Court relied on "the well-established common law of civil conspiracy" (slip op. at 6) in concluding that, to establish a *civil* violation of Section 1962(d), commission of a predicate act defined in RICO is indispensable. Thus, any civil RICO conspiracy claim depends on proving the equivalent of a completed tort under common law. *Id.* at 7. But *Reves* holds that an outsider in the posture of these petitioners bears no civil liability under Section 1962(c) for the completed tort.

Third, as this Court made clear in *Salinas* and again in *Beck*, general conspiracy principles are relevant only to the extent that they generate a presumption about congressional intent. *Salinas*, 118 S. Ct. at 476-77; *Beck*, slip op. at 6-7. But we know from *Reves* that Congress intended to exclude outside "facilitators" from substantive liability under Section 1962(c). Other conclusions about congressional intent, also based on long-established principles, follow from that knowledge.

For example, courts have recognized in many different contexts that, when Congress specifically excludes a class of persons from substantive liability, those persons are also excluded from "conspiracy" liability. See Pet. 20-21. Respondents do not deny the existence of this principle. As we explained in our Petition, these principles draw special force from limitations that were well settled in antitrust conspiracy law, which exempted outsiders such as lawyers from "conspiracy" liability for simply "facilitating" an alleged antitrust violation.[4]

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[4] Respondents argue that "there is no basis for wholesale importation of antitrust principles into RICO cases." Opp. 17. But they concede that "RICO § 1964(c), the section that provides for private civil remedies * * * was modeled on the Clayton Act." *Ibid.* Moreover, as this Court's recent decision in *Beck* makes clear, determination of civil liability for conspiracy to violate RICO requires a court "to

3. In *Beck* the Court endorsed another important concept on which our Petition rests — that there is no reason to believe that Congress intended to create vicarious liability in civil cases for outside "conspirators" when persons in this category would, under *Reves*, have no vicarious liability for aiding and abetting an actual violation of Section 1962(c).

As the Court noted in *Beck*, civil conspiracy at common law was not an independent cause of action, but was merely "a means of establishing vicarious liability for the underlying tort." Slip op. at 9 (quoting *Halberstam* v. *Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983)). Since civil conspiracy law is simply a predicate for imposing vicarious liability, it is useful to examine a related doctrine of vicarious liability — aiding and abetting — in discerning congressional intent here. At common law, accessory liability was one of a group of related concepts (including conspiracy) developed to describe the circumstances under which a third party may bear vicarious liability for facilitating or encouraging a tortfeasor's wrongful act. See RESTATEMENT (SECOND) OF TORTS § 876. Both accessory liability and conspiracy liability are defined in similar terms — agreeing to "aid" or "facilitate" the wrongful conduct.

The Petition explained why the parallels between accessorial liability and conspiracy liability support the conclusion that Congress intended to provide parallel treatment for both those who merely "facilitate" and those who merely "*agree* to facilitate" a RICO violation — but do so without personally participating or agreeing to participate in conducting the affairs of the enterprise. *Reves* established that there is no vicarious liability for merely aiding or facilitating the conduct of the managers or operators of the enterprise. So a similar result should follow under "conspiracy" principles.

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analyze §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone." Slip op. at 7, n.6. This observation confirms that civil antitrust conspiracy law is a persuasive source of guidance.

Respondents term this a "logically unwarranted leap" (Opp. 13), but their only response is to dispute that "conspiracy and accomplice theory are virtually the same." Opp. 14. Of course, there are differences. But respondents — like the court below — never identify any reason why any technical differences would have led Congress to preclude vicarious liability for *facilitating* the operation or management of a RICO enterprise, but to authorize it for merely *agreeing* to facilitate that conduct. Applying traditional civil common law concepts, therefore, the legislative judgment to limit the scope of vicarious liability for aiding and abetting also prevents claimants from using the "conspiracy" label to expand the class of persons liable for damages under RICO.

4. Moreover, in *Beck* the Court explicitly reserved a question subsumed by our Petition. The Court explained that it was not deciding whether a civil conspiracy claim "must be predicated on an *actionable* violation of §§ 1962(a)-(c)" or whether it is sufficient to show "an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused * * * injury." Slip op. at 12 n.10 (emphasis original). The Petition provides the occasion to address that question by determining whether an alleged conspirator can be held liable even without committing, or being able to commit, "an *actionable* violation" of Section 1962(c).

Finally, as *Beck* illustrates, "ordinary conspiracy principles" are not monolithic, but must be discerned and applied in specific contexts. Thus, *Salinas* – which applied certain aspects of *criminal* conspiracy law to decide a specific issue – does not dictate the answer to the question presented. Defining the contours of *civil* liability for conspiracy to violate RICO involves important practical questions for courts and litigants and warrants definitive action by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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